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IN THE

Supreme Court of the United States

OCTOBER TERM (1951)

No. 118

JOSEPH BEAUHARNAIS,

Appellant,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

APPELLANT'S BRIEF

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JOSEPH BEAUHARNAIS, Appellant, v. THE PEOPLE OF THE STATE OF ILLINOIS, Appellee.	No. 118

APPELLANT'S BRIEF

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Introductory Statement

The American Civil Liberties Union through its counsel appearing herein on behalf of the appellant, definitely rejects the views expressed by the appellant in his publications which form the basis of this prosecution. The Union undertakes this case solely because it believes that the Illinois statute in question on its face and as construed and applied is violative of the constitutional guarantees of free speech, free press, free worship and of due process.

Many states in attempting to suppress racial and religious antagonism have enacted similar statutes. They are all aimed at expressions of opinion. All invasions of the rights of free speech, press, worship and assembly must be thoroughly examined. Thus, while we detest what is here published we fight for the right of publication.

Statement of the Facts

The appellant, Joseph Beauharnais, is here seeking to overrule the judgment of the Supreme Court of the State of Illinois which affirmed judgment of guilty in the Municipal Court, Chicago. On May 14, 1950, Beauharnais was found guilty of violation of Section 224A of Division 1 of the Criminal Code (Ill. Rev. Stat., 1949, Ch. 38, p. 471) as follows:

> "It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy, or which is productive of breach of the peace or riots. Any person, firm or corporation violating any of the provisions of this section, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars ($50.00), nor more than two hundred dollars ($200.00)."

The complaint charged Beauharnais as follows:

> "On January 7, 1950, at the City of Chicago, did unlawfully, publish, present and exhibit in public places, lithographs, which publications portrayed depravity, criminality, unchastity or lack of virtue of citizens of Negro race and color and which exposes citizens of Illinois of the Negro race and color to contempt, derision, or obloquy, which more fully appears in Exhibit A, which is attached hereto and made a part hereof."

The appellant was found guilty by a jury and was fined $200.00.

During the course of the trial the appellant requested that the following instructions be given the jury:

"(15) The jury is further instructed that even though the article complained of induced a condition of unrest and dissatisfaction with conditions as they are, or even stirred the reader to anger, still they must find the defendant not guilty unless they further find beyond reasonable doubt that the article complained of was likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.

(16) The court instructs the jury that free speech and free press is guaranteed by the Constitution of the United States and also by the Constitution of the State of Illinois. A free press may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. A free press is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech and of the press, though not absolute, are, nevertheless, protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance and unrest. There is no room under our constitution for a more restrictive view. For the alternative would lead to standardization of ideas, either by legislature, courts or dominant political or community groups. No conviction can be had of the defendant in this case, even though the jury believe that the article complained of stirred people to anger, invited public dispute or brought about a condition of unrest" (R. 29).

These requests were denied and the appellant duly objected and took exception to these denials. The appellant timely moved for judgment of acquittal and/or new trial on the

following grounds (as well as others) (R. 30, 31, 32, Nos. 1, 2, 3, 7, 12, 13) as follows:

"(1) That Paragraph 471, Section 244a of Chapter 38 of the Illinois Revised Statutes is unconstitutional in that it violates the first amendment to the Constitution of the United States and also Article 2, Paragraph 4 of the Constitution of the State of Illinois.

(2) That Paragraph 471, Section 224a of Chapter 38 of the Illinois Revised Statutes is unconstitutional in that it violates the due process clause of the Fourteenth Amendment of the Constitution of the United States and also Section 2 of Article 2 of the Constitution of the State of Illinois.

(3) That the right of defendant to manufacture, publish and present the lithograph in question (People's Exhibit 3) was protected by the First Amendment to the Constitution of the United States and also by Article 2, Paragraph 4 of the Constitution of the State of Illinois, and by Section 17 of Article 2 of the Constitution of the State of Illinois.

(7) That to attempt a charge of violation of said section of the statute by the publishing or exhibiting of the lithograph in question (People's Exhibit 3) is in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States and the Constitution of the State of Illinois.

(12) The court erred in refusing to give the following instruction to the jury as requested by defendant. (This paragraph of the motion was the same as Request No. 16 appearing (supra) and is not set forth herein.)

(13) The court erred in refusing to give the following instruction to the jury as requested by defendant. (This paragraph of the motion was the same as Request No. 15 appearing (supra) and is not set forth herein.)"

The Trial Court denied this motion and the appellant appealed to the Illinois Supreme Court which on January 18, 1950, affirmed the judgment (*People of the State of*

Illinois v. *Joseph Beauharnais*, 408 Ill. 512). That Court denied a motion for rehearing on March 9, 1951, and on October 15, 1951, this Court granted certiorari.

On January 6, 1950, there was a meeting of the White Circle League in Chicago. The appellant chaired the meeting, which was called for the purpose of obtaining volunteers to carry placards, distribute leaflets and obtain signatures. One Latimore attended the meeting and offered to distribute leaflets and obtain signatures the following day. Beauharnais instructed Latimore to wear a placard (sandwich-style about the person). On the placard appeared the following words:

> "PRESERVE AND PROTECT WHITE NEIGHBORHOODS, SIGN PETITIONS HERE. SPONSORED BY THE WHITE CIRCLE LEAGUE OF AMERICA" (Govt. Ex. 2, R. 10).

Beauharnais also passed out to each volunteer a petition to be signed by passersby as follows (Govt. Ex. 3, R. 10a):

> "PRESERVE AND PROTECT WHITE NEIGHBORHOODS!
> FROM THE CONSTANT AND CONTINUOUS INVASION,
> HARASSMENT AND ENCROACHMENT BY
> THE NEGROES
>
> (We want two million signatures of White men and women)
>
> PETITION
>
> To The Honorable Martin H. Kennelly
> and City Council of the City of Chicago
>
> WHEREAS, the white population of the City of Chicago, particularly on the South Side of said city, are seething, nervous and agitated because of the constant and continuous invasion, harassment and encroachment by the Negroes upon them, their property and neighborhoods and—
>
> WHEREAS, there have been disastrous incidents within the past year, all of which are fraught with grave consequences and great danger to the Peace and Security of the people, and

WHEREAS, there is great danger to the Government from communism which is rife among the Negroes, and

WHEREAS, we are not against the Negro; we are for the white people and the white people are entitled to protection:—

We, the undersigned white citizens of the City of Chicago and the State of Illinois, hereby petition the Honorable Martin H. Kennelly, Mayor of the City of Chicago and the Aldermen of the City of Chicago, to halt the further encroachment, harassment and invasion of white people. their property, neighborhoods and persons, by the Negro—through the exercise of the Police Power; of the Office of the Mayor of the City of Chicago, and the City Council.

WANTED

ONE MILLION SELF-RESPECTING WHITE PEOPLE IN CHICAGO TO UNITE UNDER THE BANNER OF THE WHITE CIRCLE LEAGUE OF AMERICA to oppose the National Campaign now on and supported by TRUMAN'S INFAMOUS CIVIL RIGHTS PROGRAM and many Pro Negro Organizations to amalgamate the black and white races with the object of mongrelizing the white race!

THE WHITE CIRCLE LEAGUE OF AMERICA is the only articulate white voice in America being raised in protest against Negro aggressions and infiltrations into all white neighborhoods. The white people of Chicago MUST take advantage of this opportunity to become UNITED. If persuasion, and the need to prevent the white race from becoming mongrelized by the Negro will not unite us, then the aggressions * * * rapes, robberies, knives, guns and marijuana of the Negro, SURELY WILL.

The Negro has many national organizations working to push him into the midst of the white people on many fronts. The white race does not have a single organization to work on a NATIONAL SCALE to make its wishes articulate and to assert its natural rights to self-pres-

ervation. THE WHITE CIRCLE LEAGUE OF AMERICA proposes to do the job. WE ARE NOT AGAINST THE NEGRO!

WE ARE FOR THE WHITE PEOPLE!

We must awaken and protect our white families and neighborhoods before it is too late. Let us work unceasingly to conserve the white man's dignity and rights in America.

THE WHITE CIRCLE LEAGUE OF AMERICA, INC.—Joseph Beauharnais, Pres.—FR 2-8533, Suite 808, 82 W. Washington St. VOLUNTEERS NEEDED TO GET 25 SIGNATURES ON PETITION!. COME TO HEADQUARTERS!

I wish to be enrolled as a member in THE WHITE CIRCLE LEAGUE OF AMERICA and I will do my best to secure ten (10) or more members.

THE FIRST LOYALTY OF EVERY WHITE PERSON IS TO HIS RACE. ALL THE COMBINED PRO-NEGRO FORCES HAVE HURLED THEIR ULTIMATUM INTO THE FACES OF THE WHITE PEOPLE. WE ACCEPT THEIR CHALLENGE.

THEY CANNOT WIN!

IT WILL BE EASIER TO REVERSE THE CURRENT OF THE ATLANTIC OCEAN THAN TO DEGRADE THE WHITE RACE AND ITS NATURAL LAWS BY FORCED MONGRELIZATION.

THE HOUR HAS STRUCK FOR ALL NORMAL WHITE PEOPLE TO STAND UP AND FIGHT FOR OUR RIGHTS TO LIFE, LIBERTY AND THE PURSUIT OF HAPPINESS.

JOSEPH BEAUHARNAIS"

Each volunteer was also given 500 leaflets to pass out to signers (Govt. Ex. 1):

"APPLICATION FOR 1950 MEMBERSHIP

THE WHITE CIRCLE LEAGUE OF AMERICA, INC.
(Not For Profit)

Mail to—
THE WHITE CIRCLE LEAGUE OF AMERICA, INC.
82 W. Washington St.
Chicago 2, Illinois
Tel. FR 2-8533

Date_____ 19__

Membership _____ $1.00

Subscription to Monthly Magazine (WHITE CIRCLE NEWS) per year _____ 3.00

Voluntary Contribution _____

I can volunteer some of my time to aid the WHITE CIRCLE in getting under way.

(Signed) (Print Name) _____

NAME _____

ADDRESS _____ PHONE _____

CITY _____ STATE _____

(Note: Tear off and mail to Headquarters with Your Remittance.)"

There is no evidence in this case of any commotion or disturbance on the street and there is no type of breach of the peace nor incitement to breach of peace. There is no evidence that anyone was actually upset or disturbed at the meeting on January 6, 1950, or at the time of the distribution of the petitions.

Latimore and others were instructed by Beauharnais as follows: "We don't want any violence while these peti-

tions are being passed out. We just want to get a lot of signatures and we want to get a large number of members * * * those getting signatures should not let a crowd gather and shouldn't disrupt the movement of people on the sidewalk" (R. 5).

On the following day, January 7, 1950 (which is the date referred to in the complaint), one McFarland, a Government witness, saw the placard (Ex. 2) on a man standing on a public street (State and Madison Streets, Chicago). He saw two other men with the placarded man, one of whom appeared to be signing. The other had Exhibit 3 in his hand and dropped it when walking across the street. McFarland picked up Exhibit 3 and identified the same during the trial.

The Government presented two other witnesses, both eminent Negroes from the City of Chicago, and each testified that he had never been accused of any offense or any crime and denied all the allegations alleged in the petition (Govt. Ex. 3). The appellant made offers of proof through these two witnesses in attempting to prove the defense of truth (these offers were rejected and excluded, R. 16, 17).

Beauharnais testified that he was the organizer, founder, president of the White Circle League of America, an Illinois non-profit corporation organized for the purpose of maintaining and safeguarding the dignity, social edicts, custom, heritage, rights and the way of life of the white race in America. There was no dispute about Beauharnais running the meeting and passing out the literature for distribution, but he was not on the street himself and did not carry placards or distribute any leaflets on the street. Objections to the appellant's testimony concerning the meaning of the words used in Exhibit 3 and his attempts to prove the allegations were sustained (R. 19, 20, 21).

POINTS FOR ARGUMENT

I

The Illinois Statute, Sec. 224A of Div. 1 of the Criminal Code, Chapter 38, Paragraph 471 of the Illinois Revised Statutes of 1949 as construed and/or applied by the Supreme Court of Illinois is invalid, nevertheless, because it infringes upon the constitutional guarantee of free speech, press and of assemblage as guaranteed by the First and Fourteenth Amendments of the Constitution of the United States.

II

The Illinois Statute is void as being in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States in that it is vague and indefinite and does not adequately apprise the citizen of the offense charged.

ARGUMENT

I

The Illinois Statute, Sec. 224A of Div. 1 of the Criminal Code, Chapter 38, Paragraph 471 of the Illinois Revised Statutes of 1949 as construed and/or applied by the Supreme Court of Illinois is invalid, nevertheless, because it infringes upon the constitutional guarantee of free speech, press and of assemblage as guaranteed by the First and Fourteenth Amendments of the Constitution of the United States.

For the first time this Court is faced with one of the many so-called "race" or "group libel laws". The purport of these statutes as a whole and the Illinois statute in particular, is two-fold. First, to extend the civil libel law to groups classed because of race, color, creed, religion or ancestry. Second, to make violation of the law a criminal offense punishable by fine or imprisonment.

Because the statute seeks to prohibit certain publications (in various forms), it thus draws into issue the question of its constitutionality.

This Court has ruled consistently that the clear and present danger doctrine is to be applied in all speech cases. That the state may protect against disorder, riot or breach of the peace is fundamental. That the state may regulate speech, press or worship but cannot arbitrarily prohibit it is also well settled (*Kunz* v. *New York*, 340 U. S. 290). Speech and press may be punished only under certain conditions and that is where such speech or press creates an imminent clear and present danger of breach of the peace.

The Illinois statute does not regulate. It prohibits certain expression. The Illinois Supreme Court justifies constitutionality on the "fighting words" theory expressed by this Court in *Chaplinsky* v. *State of New Hampshire*, 315 U. S. 658, and apparently rules that there need be no finding or ruling of clear and present danger. The statute in the *Chaplinsky* case provided in part as follows: "No person shall address any offensive, derisive or annoying language to any other person on any public street or way." The Supreme Court of New Hampshire ruled that the statute applied and was valid only when as a result of such use of such language a breach of the peace was imminent. It was this ruling that was reviewed by this Court. Chaplinsky was punished not for words that were used in the abstract or in a vacuum but for words used "in a face to face situation", which created a clear and present danger. That is totally different than saying that mere "fighting words" in a vacuum are punishable.

The Supreme Court of Illinois misapplied and misinterpreted the *Chaplinsky* case. It found that there was an eventual danger but not a clear present and imminent danger. The Court said as follows: "Any ordinary person could only conclude from the libelous character of the language that a clash and riot would eventually result between the members of the White Circle League of

America and the Negro Race" (R. 40). Indeed there is no evidence at all of any imminent threat, merely a man carrying a placard on a street, passing out leaflets and obtaining a signature, and that is all there is, even though the Illinois Court says that the charge included the solicitation of volunteers and the general direction of the movement by the appellant (R. 38). This adds nothing more to the imminency of any breach of the peace. It adds absolutely nothing of any consequence. If there be any doubt of the Illinois Court's interpretation it apparently sustained the Trial Court's refusal to grant requested instructions which called for the application of the clear and present danger theory (R. 29). In addition, the statute has at least two component parts, either one of which could serve as a basis for complaint.

There is one under which this petitioner was prosecuted and there is another where such conduct of the defendant is productive of breach of the peace or riots. The petitioner was not charged with doing certain things which were productive of a breach of the peace or riots. He is simply charged with publishing, presenting and exhibiting certain lithographs in violation of that section of the statute which merely refers to so-called criminally libelous words. Clearly it was the intent of the legislature of the State of Illinois to make two separate bases for complaint. The Supreme Court of Illinois did not comment on this separation. Therefore, we have to deal only with this case on the basis that there is nothing in the evidence and that there is no charge that any breach of the peace or riots would result from the publication of the particular lithographs. Furthermore, it should be called to the attention of the Court that the Supreme Court of the State of Illinois, in its opinion, stated:

> "The very statute which defendant challenges as unconstitutional was upheld in the case of Bevins v. Prindable, 39 Fed. Supp. 708, and affirmed by the U. S. Supreme Court in a memorandum opinion at 314 U. S. 573."

However, a careful check of the *Bevins* case clearly indicates that the Court did not so rule. As a matter of fact, the Court specifically ruled as follows (p. 712):

> "In the view we take of the case under the evidence we do not find it now necessary to consider the constitutionality of the statute. In passing, however, we do say it is not clearly apparent that the statute in question is unconstitutional."

The Illinois Court then goes on to discuss the question of vagueness which is further discussed in this brief under Point II of the argument. In the *Bevins* case the only thing that the Supreme Court affirmed was the specific finding of the District Court that no case was made out by the petitioners for injunctive relief and in no way can the affirmance of judgment by the Supreme Court in the *Bevins* v. *Prindable* case be taken to mean that the statute here drawn in question was constitutional. As a matter of fact, this Court in *Winters* v. *New York*, 333 U. S. 507, 68 Sup. Ct. 665, cites the New Jersey case of *Klapprott* v. *New Jersey*, 127 N. J. L. 395, in an apparently favorable manner. The New Jersey case held that a similar statute was unconstitutional on its face. In the *Bevins* case the United States District Court opined that the constitutionality of this section of the Illinois law should be ruled upon, first, by the highest Court in the State of Illinois.

In *Terminiello* v. *City of Chicago*, 337 U. S. 713, this Court stated:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stir people to anger."

The ordinance and the charge in the *Terminiello* case was even more carefully drawn than this one and dealt specifically with creation of breach of the peace. The rul-

ing of the Supreme Court in the *Terminiello* case, however, was confined to the application of the ordinance to the conduct of the defendant. It is our contention here that this statute first of all on its face is invalid and void because it is prohibitive of free speech, press and assemblage, and, secondly, that if our first proposal is not sustainable then as construed and applied, the Illinois law violates the petitioner's right of free speech, press and assemblage because there was no evidence of clear and present danger and because the information under which this defendant was charged does not charge that his remarks were productive of riots or breach of the peace.

There remains the question of the application of this Court's opinion in the recently decided *Dennis* case, *Dennis* v. *U. S.*, 341 U. S. 495. There, this Court held the issue of clear and present danger was to be decided by the Court and not by the jury. At least up until that time, it had always been supposed that the determination of the factual situation with regard to clear and present danger was one for the fact finding body, namely, the jury or a Judge sitting without jury. In the case at bar the Court refused to instruct the jury on this matter (R. 29, Nos. 15, 16). The Supreme Court of Illinois, in its opinion, does not comment on the Court's refusal to so instruct the jury, but finds simply that the Illinois statute is one of those "fighting word" statutes, but it is clear on the reading of the record and of the opinion in this case that neither the Trial Court nor the Supreme Court found as a fact or a matter of law that there was a clear and present danger. Taken together with the separation of the statute, which makes two offenses, we find that the *Dennis* case is not decisive of this case.

The appellant does not waive the argument that the finding of clear and present danger is a finding of fact to be found by the jury rather than by the Court. The appellant still maintains that no Court could rule as a matter of law when there is or is not a clear and present danger.

That since speech is limited by the existence of such threat the determination that said existence is one clearly of fact and therefore the sole province of the fact finding agency.

The Illinois Court finally says: "the libelous and inflammatory language used in Exhibit A (Govt. Ex. 3) was designed to breed hatred against the Negro race and is not of such character as entitles defendant to the protection of freedom of speech guaranteed by the State and Federal Constitutions" (R. 41).

If the Court meant to prematurely agree with the dissent in *Kunz* v. *New York*, cited *supra*, then it ignores the fundamental proposition that when considering the constitutionality of a law on its face the facts in the case are not in issue. Facts are in issue when the Court comes to a consideration of determining whether or not a statute as construed and applied is void or valid. The social value of words is a matter of opinion and if the Illinois Court is right almost any disagreeable expression could be prohibited on the basis of its statement.

II

The Illinois Statute is void as being in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States in that it is vague and indefinite and does not adequately apprise the citizen of the offense charged.

This Court has enunciated several times the standards which must be applied in determining whether or not a statute meets the test of the due process clause of the Fifth Amendment and the requirement of the Sixth Amendment concerning the right of the defendant to be fully informed of the charge against him. Both such provisions have been made applicable to the states by virtue of the Fourteenth Amendment.

In *Winters* v. *New York*, cited *supra*, this Court struck down a New York statute on obscenity which made it an offense to publish stories principally made up of crimes, lust, etc. The Court said that the statute was so vague that men of reasonable understanding could not determine when an offense had been committed. This followed the theory as set forth in the Court in *Connally* v. *General Construction Co.*, 269 U. S. 385, 46 S. C. 126, and the well known case of *Cantwell* v. *Conn.*, 310 U. S. 296, 60 Sup. Ct. 900. See also the late case of *Jordan* v. *DeGeorge*, U. S. .

The Illinois statute can be divided into three sections, which three sections attempt to define the offense. To quote the statute and separate it as intended, counsel sets it forth below:

> "It shall be unlawful for any person, firm or corporation to manufacture, sell or offer for sale, advertise or publish, present or exhibit, any lithograph, moving picture, play, drama or sketch
>
> 1. which publication or exhibition portrays depravity, criminality, unchastity or lack of virtue of a class of citizens of any race, color, creed or religion.
>
> 2. which publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision or obloquy; or
>
> 3. which is productive of breach of the peace or riots."

The appellant has been charged with violation of 1 and 2 in a single complaint but he is not charged with violation under 3, and there is no evidence of any danger or imminent breach of the peace or riots.

Under number 1 the significant words are "portrays, depravity, criminality, unchastity or lack of virtue". Clearly, references to German Nazis, Italian Fascists, Japanese War Mongers so often referred to in the press during and after the war as murderers, criminals, butchers, liars, etc., must be punishable. Today references to the

Russian or Chinese Communists as liars, pagans, ungodly, etc., must also be punished. The New and the Old Testament, the works of Shakespeare and many of the classics must also be the subject of prosecution for they, too, refer to races and religions within the possible meaning of the words used in this part of the statute.

In this case, the Illinois Court said, "in fact it is hard to see how, with the libelous publication in evidence, any proof of good motives or justifiable ends could be introduced" (R. 40). The Court did not deal with the refusal of the Trial Court to allow cross-examination of Government witnesses in an attempt to prove truth, but truth is only a defense and has nothing to do with the offense such as the Massachusetts law provides.[1]

Under subdivision II of the statute the significant words are "exposes to contempt, derision or obloquy". This is far broader than the previous phraseology and amounts to a dragnet to draw in any remark whatsoever.

In *State* v. *Klapprott*, 127 N. J. L. 395, similar words were employed in a similar statute and the defendant was charged with making and publishing an attack on the Jews and the New Jersey Court in holding the statute void said in part at page 402:

> "It is our view that the statute, *supra*, by punitive sanction, tends to restrict what one may say lest by one's utterances there be incited or advocated hatred, hostility or violence against a group 'by reason of race, color, religion or manner of worship'. But additionally and looking now to strict statutory construction, is the statute definite, clear and precise as to be free from the constitutional infirmity of the vague and indefinite? That the terms 'hatred', 'abuse', 'hostility' are abstract and indefinite admits of no contradiction. When do they arise? Is it to be left to a

[1] Mass. Gen. Laws Ch. 282 Sec. 98C. "Whoever publishes any *false* written or printed matter with intent to maliciously promote hatred of any group of persons in the commonwealth because of race, color or religion shall be guilty of libel and shall be punished."

> jury to conclude beyond reasonable doubt when the emotion of hatred or hostility is aroused in the mind of the listener as a result of what a speaker has said? Nothing in our criminal law can be invoked to justify so wide a discretion. The Criminal Code must be definite and informative so that there may be no doubt in the mind of the citizenry that the interdicted act or conduct is illicit. The element of 'violence', mentioned in the statute, is universally understood to connote the unlawful exercise of force, i.e., a breach of the peace, but in the indictments before us neither breach of the peace nor resulting violence are alleged."

There is nothing in the case at bar alleging any breach of the peace nor is there any evidence of the same. And on page 403 the New Jersey Court went on to say:

> "Then these passions or emotions 'hatred', 'Hostility', etc., as well as being abstract, are relative in the individual. There is no norm to judge whether or when such emotion or passion comes into being. We do not think such phases of human reaction or emotion can be made a legitimate standard for a penal statute."

What the New Jersey Court stated is fully applicable here. When it comes to religion or race many people are extremely sensitive, many are offended and angered by any remark whatsoever. Sometimes even the way or manner in which words are spoken may show contempt, derision or obloquy.

It is our contention that a man has a right to criticize a religious group because of its activities, or a racial group because of its activities. A non-Zionist Jew has the right to take to task a Zionist Jew and in so doing may use the words "Zionist Jew". He may use such words so as to group all Zionist Jews together and not any one in particular. Likewise the Negro race will have a perfect right to criticize the conduct of whites and conversely white people have the right to criticize Negroes. We should not interfere with the right of Protestants to criticize Catholics and vice versa.

When viewing the statute, minus the provision concerning breach of peace or riots, we find that any application of this statute would possibly interfere with some of these matters above enumerated. As was pointed out in the brief filed by petitioner in the Supreme Court of the State of Illinois, the constant derision of American citizens of Japanese ancestry would subject practically every single newspaper in the State of Illinois to prosecution under this law and, today, present criticism of Chinese whether you call them Communist Chinese or non-Communist Chinese would subject anyone to prosecution. The same may be applied to the Russian people. Under what circumstances can any individual be apprised of what is unlawful under this statute? Again, the Court below cites *Bevins* v. *Prindable* to support its contention that this statute was constitutional and was not void for vagueness. The United States District Court in the *Bevins* case said as follows:

> "With reference to the Statute plaintiff says it is vague and indefinite. There is truth in the charge but the statute deals with the type of offense that defies exact definitiveness. In that respect it is similar to statute creating the offense of criminal libel, Chapter 38, Sec. 402, Illinois revised Statutes 1939. Whether a statute of the State of Illinois is valid which makes the defamation of a class a criminal offense would seem first to be a question of the courts of Illinois. This statute does not subject the plaintiffs to previous restraint such as received the condemnation of the Supreme Court in Lovell v. Griffin, 303 U. S. 444, etc."

The Court went on to say that the plaintiff in the *Bevins* case had ample opportunity to test the constitutionality of the statute in the State Court of Illinois wherein criminal prosecution was then pending and in the next to the last paragraph the District Court said as follows:

> "The precise question presented to us now takes form as follows: Should an application for an interlocutory injunction restraining state officers from en-

forcing a state criminal statute be allowed where the statute is not clearly unconstitutional and where the evidence shows that though some injuries and loss may be suffered by plaintiffs, through the enforcement of the statute, which may, because of their nature, be irreparable, it fails to appear that such injuries and loss need be more than slight or inconsequential? We think the question must be answered in the negative and the application for interlocutory injunction denied."

Under number 3 of the subdivision of the Illinois statute the important words are: "which is productive of a breach of the peace or riot". Again to reiterate, the appellant is not charged with doing anything which would be productive of a breach of the peace or riot, and there is no evidence to support any such statement. These added words in the statute do not correct any invalidity because of vagueness. If anything they simply add a third provision for prosecution. How can it be said that these words in any way explain contempt, derision or obloquy? The Illinois Court ruled that to show clear and present danger is unnecessary as this is a "fighting words" statute. This has been previously discussed under Point I of the argument.

CONCLUSION

In conclusion the Illinois statute fails because:

1. It is void on its face as it is in contravention of the constitutional guarantees of free speech, press and worship.

2. Even as construed and applied, it is void, as it invalidly deprives the appellant of his constitutional rights.

3. It is void as construed and applied because the Supreme Court of Illinois refused to apply the clear and present danger doctrine.

4. The Illinois statute is void on its face and fails to set a reasonable standard by which a citizen may be apprised of any offense.

5. Under any circumstances the appellant has not been charged with doing anything which was productive of a breach of the peace or riots or created any imminent danger thereof, and there is no evidence to support any such conclusion.

Therefore, it is respectfully urged that this Court reverse the judgment of the Supreme Court of Illinois and order that a judgment of not guilty be entered herein.

The American Civil Liberties Union and its counsel herein wish to say again to this Court, that we do not favor the utterances of the appellant and that we will do all in our power to oppose any such abhorrent utterances by combatting them in the proper forum. They ought not be left unanswered—and indeed the American Civil Liberties Union is one of the leading organizations that does make such answer—but when it comes to the issue of a right to publish these utterances the American Civil Liberties Union stands four-square on its established policy of defending the constitution and protecting the constitutional rights of all regardless of how we may disagree with them.

Respectfully submitted,

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